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Nos. 00-1531 and 00-1711

In the Supreme Court of the United States

VERIZON MARYLAND INC., PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent Public Service Commission of Maryland, et al. (MPSC) does not seriously dispute that Verizon's claims in this case "aris[e] under the * * * laws * * * of the United States" within the meaning of 28 U.S.C. 1331. See MPSC Br. 12 & n.11. Nor can that fact be disputed. The underlying complaint asserts that MPSC construed and enforced Verizon's interconnection agreement with WorldCom in a manner prohibited by the Telecommunications Act of 1996 (1996 Act) and the

FCC's orders pursuant to the 1996 Act. Verizon Pet. App. 7a. It is well settled that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute, which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983).

MPSC offers only a cursory defense (Br. 15) of the court of appeals' principal rationale for rejecting Verizon's invocation of the district court's jurisdiction under 28 U.S.C. 1331—namely, that 47 U.S.C. 252(e)(6), which expressly recognizes the district courts' jurisdiction to review state commission "determinations" under the 1996 Act, deprives the district courts, by negative implication, of jurisdiction to review any state commission "determinations" that may be outside its scope.[1] As previously explained, however, nothing in Section 252(e)(6) states, or even suggests, any limitation on the jurisdiction that the district courts otherwise possess under Section 1331 with respect to claims arising under federal law. See U.S. Opening Br. 21-24. Although MPSC also attempts (Br. 42-47) to sustain the court of appeals' rejection of Section 1331 jurisdiction based on the *Rooker-Feldman* doctrine, that doctrine applies only to challenges to the decisions of state courts, and thus has no application to decisions of state regulatory commissions. See U.S. Opening Br. 25-26.

MPSC devotes most of its brief to questions that are not before the Court in this case. The Court granted certiorari solely on the question "[w]hether a federal district court has subject-matter jurisdiction under

[1] All citations of provisions of the 1996 Act are of Supp. V 1999.

28 U.S.C. 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act." U.S. Pet. (I); see also Verizon Pet. (I). That question is analytically distinct from the questions whether a carrier has a private right of action to challenge state commission orders that violate the 1996 Act (see MPSC Br. 11-25) or whether a state commission or its commissioners may be named as defendants in such an action, consistent with principles of sovereign immunity, even if the action may proceed against other parties (see MPSC Br. 26-42). As for the first of those questions, it has long been understood that a party has a federal cause of action for declaratory and injunctive relief against state officials who are alleged to have exercised their authority in a manner contrary to controlling federal law. See pp. 8-9, *infra*. As for the sovereign immunity question, the Court granted certiorari on that question in *Mathias* v. *Worldcom Technologies, Inc.*, No. 00-878, and the United States has addressed the question in that case. See U.S. Br. at 29-49, *Mathias*, *supra*.

I. MPSC CONFLATES THE QUESTION WHETHER SUBJECT-MATTER JURISDICTION EXISTS UNDER 28 U.S.C. 1331 WITH THE QUESTION WHETHER A PRIVATE RIGHT OF ACTION EXISTS TO ENFORCE THE 1996 ACT

A. MPSC initially contends that "the 1996 Act does not create a private cause of action." MPSC Br. 11 (capitalization omitted). That contention, which is addressed on its merits below (pp. 8-10), is irrelevant to whether district courts possess subject-matter jurisdiction under 28 U.S.C. 1331 to adjudicate cases such as this one. "It is firmly established in [the Court's] cases that the absence of a valid (as opposed to arguable)

cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); see also, *e.g.*, *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("[w]hether a cause of action exists is not a question of jurisdiction"); *Burks* v. *Lasker*, 441 U.S. 471, 476 n.5 (1979). Accordingly, the Court need not be detained by MPSC's extended discussion (Br. 11-25) of whether Congress expressly or implicitly provided carriers with a private cause of action to enforce the 1996 Act.

MPSC's error in conflating the separate questions of whether subject-matter jurisdiction exists (the question on which the Court granted certiorari) and whether a private cause of action exists (a question not previously addressed in this case) infects much of its brief. For example, MPSC devotes fully six pages (Br. 13-18) to a discussion of whether a carrier's claim that a state commission has construed or enforced an interconnection agreement in a manner contrary to federal law satisfies the test announced in *Cort* v. *Ash*, 422 U.S. 66 (1975). But *Cort* v. *Ash* and its progeny concern whether a private right of action may be inferred from a federal statute or constitutional provision that does not expressly provide one. Those cases have nothing to do with a district court's jurisdiction, expressly granted by 28 U.S.C. 1331, to decide cases arising under federal law.

MPSC's error is also evident in its discussion (Br. 20-22) of *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982). In that case, a union brought suit in federal district court against a city and a private transit company. The union claimed that the defendants had violated Section

13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. App. 1609(c) (1982), which required that transit workers' collective-bargaining rights be protected when a state or local government received federal funds to acquire a transit company. The district court held that it lacked subject-matter jurisdiction over the case. The Sixth Circuit reversed, holding, first, that there was "subject-matter jurisdiction under 28 U.S.C. § 1331, because the union's claim arose under the laws of the United States," and, second, that the union stated a cause of action under UMTA. *Jackson Transit*, 457 U.S. at 19. This Court "agree[d] with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U.S.C. § 1331 to hear the union's suit," because "[t]he complaint alleged a violation of the § 13(c) agreement required by the UMTA and of the subsequent collective-bargaining agreement contemplated by the Act, and prayed for relief under federal law." *Id.* at 21 n.6. The Court went on to hold, however, that the union's contract action was not a federal cause of action. *Id.* at 21-29. *Jackson Transit* thus confirms that the jurisdictional question is separate from, and antecedent to, the question whether a federal cause of action exists. MPSC seeks (Br. 21) to dismiss *Jackson Transit* as "merely" involving the district court's "jurisdiction to determine whether the union had a cause of action." But that is precisely what subject-matter jurisdiction is.

B. MPSC mistakenly characterizes (Br. 23) as "unprecedented" and "novel" the proposition that "under § 1331 federal district courts can hear virtually any claim unless Congress has expressly barred the court from hearing that claim." With respect to claims arising under federal law (which are the only claims that Verizon has asserted in this case), that proposition is

confirmed by decades of precedent of this Court and the lower federal courts. This Court has consistently understood Congress to have meant what it said in 28 U.S.C. 1331 when it vested the district courts with jurisdiction over "all civil actions arising under the * * * laws * * * of the United States" (subject in earlier times to a monetary floor). See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 515 (1969) ("[I]t has generally been recognized that the intent of the drafters [of Section 1331] was to provide a broad jurisdictional grant to the federal courts."); *Bankers Trust Co.* v. *Texas & Pac. Ry.*, 241 U.S. 295, 305 (1916) (describing the statutory predecessor to Section 1331 as a "broad[] exercise[]" of Congress's constitutional authority to prescribe the jurisdiction of the lower federal courts). It would be contrary to the expansive text of Section 1331—as well as to the purpose that it reflects of presumptively providing a federal forum for any cause of action arising under federal law—if courts were to recognize exceptions that Congress has not provided expressly or by the clearest implication. See, *e.g.*, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494 (1991); cf. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

No such exception can be derived from 47 U.S.C. 252(e)(6), which states that "any party aggrieved by" a state commission's determination under Section 252 "may bring an action in an appropriate Federal district court to determine whether the agreement * * * meets the requirements of section[s] 251 [and 252]." See U.S. Opening Br. 21-22. Section 252(e)(6) is most sensibly understood as confirming the district courts' jurisdiction to consider all claims that a state commission has acted contrary to Sections 251 and 252 (and the FCC's implementing rules) with respect to an interconnection agreement, whether the claim arises when the state commission approves or rejects the agreement or subsequently when the commission resolves a dispute about its meaning or effect. See U.S. Br. 16-29, *Mathias*, *supra*. In any event, Section 252(e)(6) does not purport to deprive the district courts of any jurisdiction they otherwise possess under Section 1331 with respect to claims arising under federal law. Any possible doubt on that score is resolved by Congress's directive in the 1996 Act that its provisions "shall not be construed to modify, impair, or supersede Federal * * * law unless expressly so provided." Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (*reprinted in* note following 47 U.S.C. 152).[2]

[2] MPSC cites (Br. 20) four district court cases as having "found that jurisdiction is limited to the 1996 Act," and thus presumably cannot be based on other jurisdictional grants such as 28 U.S.C. 1331. None of those cases even suggests, much less holds, that a district court lacks jurisdiction under 28 U.S.C. 1331 (or, for that matter, 47 U.S.C. 252(e)(6)) in the circumstances of this case. One case holds, contrary to MPSC's position, that 47 U.S.C. 252(e)(6) confers jurisdiction on the district courts to decide issues of federal law that arise in the interpretation of previously approved interconnection agreements. *Michigan Bell Tel. Co.* v. *MFS Intelenet of Mich., Inc.*, 16 F. Supp. 2d 817, 823-824 (W.D. Mich. 1998). The court therefore concluded that "it need not determine whether Section 1331 also supports federal jurisdiction." *Id.* at 824. Another of the cases cited by MPSC does not address jurisdiction at all, but instead addresses whether a private right of action exists under 47 U.S.C. 254, a provision of the 1996 Act that is not at issue in this case (or in *Mathias*). *Utility Reform Network* v. *California Pub. Utils. Comm'n*, 26 F. Supp. 2d 1208 (N.D. Cal. 1997). The two remaining cases simply hold that a district court does not have jurisdiction under 47 U.S.C. 252(e)(6) to address matters that have not yet been decided by the state commission.

C. Although the question is not presented in this case, a carrier has a federal cause of action for declaratory and injunctive relief against the enforcement of a state commission order that violates the 1996 Act. See *AT&T* v. *Iowa Utils Bd.*, 525 U.S. 366, 379 n.6 (1999) (observing that the 1996 Act leaves "no doubt" that "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel").

First, the carrier may be viewed as asserting a claim for equitable relief under the Supremacy Clause and the federal jurisdictional statutes on the ground that an Act of Congress preempts a state regulatory action. The district courts routinely adjudicate such claims without requiring a specific statutory right of action, and this Court has reviewed such claims on the merits. See, *e.g.*, *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 371 (2000) (claim that state statute "unconstitutionally infringed the federal foreign affairs power, violated the Foreign Commerce Clause, and was preempted by [a] federal Act"); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) (claim that state regulation was preempted by federal statute); *Shaw* v. *Delta Air Lines*, 463 U.S. at 96 n.14 (1983) (noting that "[t]his Court, of course, frequently has resolved pre-emption disputes" in this posture); *Ex parte Young*, 209 U.S. 123 (1908); see also, *e.g.*, *Guaranty Nat'l Ins. Co.* v. *Gates*, 916 F.2d 508, 512 (9th Cir. 1990) ("the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution

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Indiana Bell Tel. Co. v. *McCarty*, 30 F.Supp.2d 1100, 1103-1104 (S.D. Ind. 1998); *GTE N.W., Inc.* v. *Nelson*, 969 F. Supp. 654 (W.D. Wash. 1997).

or laws") (quoting 13B Charles A. Wright, et al., *Federal Practice and Procedure* § 3566, 102 (1984)); *Western Air Lines, Inc.* v. *Port Auth.*, 817 F.2d 222, 225-226 (2d Cir. 1987). Several Members of the Court have expressly addressed the existence of such a cause of action. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.) (a plaintiff may vindicate a federal preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," regardless of whether the plaintiff "can show the deprivation of a right, privilege, or immunity secured by federal law" that would entitle him to other relief) (citing 28 U.S.C. 1331, 2201, 2202).

Alternatively, a carrier could be viewed as having a private right of action under either the 1996 Act, or under 42 U.S.C. 1983 (as to state defendants) and 47 U.S.C. 207 (as to carrier defendants), to seek declaratory and injunctive relief from a state commission order that violates the 1996 Act. See *Suter* v. *Artist M.*, 503 U.S. 347, 355-356 (1992) (Section 1983 inquiry turns on whether a statute "create[s] enforceable rights" and does not "foreclose [their] enforcement" under Section 1983); *id.* at 363-364 (implied right of action inquiry turns on "whether Congress intended to create the private remedy sought by the plaintiffs"); see also *Blessing* v. *Freestone*, 520 U.S. 329, 346 (1997) (noting that burden falls on state defendant to "make the difficult showing that allowing § 1983 actions to go forward * * * 'would be inconsistent with Congress' carefully tailored scheme'"). Section 251 of the 1996 Act imposes reciprocal duties, and thus confers reciprocal rights, on carriers as parties to interconnection agreements. See 47 U.S.C. 251(a)-(b) (prescribing

"duties" of "[e]ach telecommunications carrier" and "[e]ach local exchange carrier"); 47 U.S.C. 251(c) (prescribing additional "duties" of "each incumbent local exchange carrier"). Section 252 provides for those duties and rights to be enforced in the first instance by a state commission or, if it elects not to exercise that authority, by the FCC. See 47 U.S.C. 252(a)-(e). Congress plainly intended for those duties and rights ultimately to be enforceable in federal court. Indeed, Section 252(e)(6) expressly provides that "any party aggrieved by [a] determination" of a state commission under Section 252 "may bring an action in an appropriate Federal district court." 47 U.S.C. 252(e)(6). And, whether or not the Court construes Section 252(e)(6) in *Mathias* as directly encompassing district court review of orders enforcing existing interconnection agreements, Section 252(e)(6) does not evince any affirmative congressional intent to foreclose such review.[3]

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[3] In arguing to the contrary, MPSC notes (Br. 16) that an earlier version of the 1996 Act expressly provided a private right of action. That provision, contained in Section 257(c) of the original Senate bill, would have made a cause of action *for damages* available to "any person who is injured in its business or property by violations" of the local-competition requirements or an interconnection agreement. S. Rep. No. 23, 104th Cong., 1st Sess. 105 (1995). Such a right of action would have been considerably more expansive than the right of action addressed in the text here. Accordingly, even if the omission of Section 257(c) could be viewed as an expression of congressional disapproval of the particular cause of action for damages that it would have provided, it could not be viewed as an expression of congressional disapproval of the cause of action for declaratory and injunctive relief asserted by Verizon in this case.

II. MPSC CONFLATES THE QUESTION OF SUBJECT-MATTER JURISDICTION UNDER 28 U.S.C. 1331 WITH THE QUESTION OF SOVEREIGN IMMUNITY

MPSC next contends that "the Eleventh Amendment mandates that this case be dismissed," either because MPSC "has not waived its sovereign immunity" or because "this proceeding does not meet the requirements of the *Ex parte Young* exception." MPSC Br. 26, 36 (capitalization omitted). No question of sovereign immunity, however, is before the Court in this case.

The court of appeals addressed the question of subject-matter jurisdiction under 28 U.S.C. 1331 separately from the question of sovereign immunity. Compare Verizon Pet. App. 47a-50a (discussing jurisdiction under Section 1331) with *id.* at 8a-30a (discussing sovereign immunity). As the court of appeals recognized (*id.* at 29a- 30a), the Section 1331 question concerns whether district courts may exercise jurisdiction over claims that a state commission order construing an interconnection agreement violates the 1996 Act, even if the plaintiff names as defendants only the other parties to an agreement, and not the state commission or commissioners.

The petitions for certiorari filed by the United States and Verizon sought the Court's review on four questions, two of which challenged the court of appeals' rulings on subject-matter jurisdiction and two of which challenged its rulings on sovereign immunity. See U.S. Pet (I) (questions presented); Verizon Pet. (I) (questions presented). The Court granted certiorari only on the question of subject-matter jurisdiction under Section 1331. The Court had already granted certiorari on the same sovereign immunity questions in the

Mathias case, and the United States has addressed those questions in that case. See U.S. Br. at 29-49, *Mathias*, *supra*.[4]

III. THE ROOKER-FELDMAN DOCTRINE DOES NOT BAR SUBJECT-MATTER JURISDICTION OVER THIS CASE

MPSC finally contends (Br. 42-47) that the *Rooker-Feldman* doctrine precludes a district court from exercising jurisdiction over a suit challenging the decision of a state commission under the 1996 Act. See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). As previously explained, the *Rooker-Feldman* doctrine has no application to this case. See U.S. Opening Br. 25-26. That doctrine is designed to prevent litigants from circumventing 28 U.S.C. 1257, which provides for review in this Court of decisions of the highest state court, by seeking review of such decisions in the lower federal courts. No circumvention of 28 U.S.C. 1257 occurs where, as here, the underlying dispute has not been presented to the state courts. Nor is it relevant for present purposes that MPSC might be viewed as having acted in a "quasi-judicial" capacity in this case. Such an inquiry is conducted under the *Rooker-Feldman* doctrine only in assessing whether

[4] Since the filing of the United States' brief in *Mathias*, those questions have been addressed by another court of appeals. See *MCI Telecomms. Corp.* v. *Bell Atl.-Pa.*, No. 00-2257, 2001 WL 1381590 (3d Cir. Nov. 2, 2001). The Third Circuit, consistent with all of the courts of appeals that have addressed those questions with the exception of the Fourth Circuit, held that the Eleventh Amendment does not bar suits against state commissions or their commissioners seeking review of their orders for compliance with the 1996 Act.

the act of the highest state court is a judicial act, and thus one that could be reviewed in this Court, as opposed to a legislative, administrative, or ministerial act. See, *e.g.*, *Feldman*, 460 U.S. at 476-482. It is not conducted to determine whether a regulatory entity, which plainly is *not* a state court, should be treated as one for purposes of 28 U.S.C. 1257.[5]

Moreover, Congress has expressly made at least some decisions of state commissions under Sections 251 and 252 reviewable in district court. 47 U.S.C. 252(e)(6). Indeed, Congress has made the district courts the exclusive forum for seeking review of state commission decisions approving or rejecting interconnection agreements as an initial matter. See 47 U.S.C. 252(e)(4). Congress thus should be presumed to have concluded that such review may occur consistently with 28 U.S.C. 1257. MPSC offers no reason to surmise that district court review does not offend the *Rooker-Feldman* doctrine when the state commission order concerns a new interconnection agreement—a circumstance in which MPSC concedes (Br. 15) Congress provided for such review—but somehow does offend the *Rooker-Feldman* doctrine when the state commission order concerns a previously approved agreement.

[5] Similarly, the Anti-Injunction Act, 28 U.S.C. 2283. which prohibits district courts (with certain exceptions) from "grant[ing] an injunction to stay proceedings in a State court," has been recognized not to apply to state regulatory commissions. See, *e.g.*, *Entergy, Arkansas, Inc.* v. *Nebraska*, 210 F.3d 887, 900-901 (8th Cir. 2000) (noting that "every circuit to have addressed the question [whether 28 U.S.C. 2283 applies to state administrative proceedings] has held that it does not") (citing cases); *Bud Antle, Inc.* v. *Barbosa*, 45 F.3d 1261, 1271 (9th Cir.) (citing cases), cert. denied, 515 U.S. 1159 (1995); cf. *Gibson* v. *Berryhill*, 411 U.S. 564, 573 n.12 (1973) (declining to address the question).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for further proceedings, which may, if appropriate, include further consideration in light of the Court's decision in *Mathias* v. *Worldcom Technologies, Inc.*, No. 00-878.

Respectfully submitted.

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NOVEMBER 2001